

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITCHELL RICKER et al. : CIVIL ACTION  
:   
v. :   
:   
SERGEANT :   
MICHAEL D. WESTON et al. : NO. 99-5879

MEMORANDUM

Dalzell, J.

November 22, 2000

This § 1983 action alleges that various members of the Easton, Pennsylvania police department and city government violated three citizens' rights after a Thanksgiving football game three years ago. We here consider the defendants' motion for partial summary judgment.

I. Background

A. Facts

We will not here attempt to recapitulate the intricate facts underlying this case, involving as it does the independent activities of three plaintiffs and at least eight defendants during what was, by all accounts, a somewhat chaotic series of events. For present purposes, we will outline a bare sketch of what is at issue.<sup>1</sup>

---

<sup>1</sup>The facts as briefly outlined below are not necessarily completely undisputed -- indeed, the parties' versions of the events on the bridge are in great part quite different -- and are provided solely to give background to our subsequent discussion of the merits of the defendants' motion. Any disputes as to material fact among the parties will be addressed, where significant, in our analysis.

The events of consequence occurred on November 27, 1997, Thanksgiving Day. On that day, as on every Thanksgiving Day, the Phillipsburg, New Jersey high school football team played its cross-river rival from Easton (Pennsylvania) High School. Because of the size of crowd expected for this game, it was held at the stadium on the campus of Lafayette College in Easton.<sup>2</sup> The football game began at around 10:30 a.m., and Phillipsburg High won handily.<sup>3</sup> Each of the plaintiffs attended the game as a supporter of the Phillipsburg High School team.

After the game ended, large numbers of Phillipsburg fans, including the three plaintiffs, proceeded back towards Phillipsburg from Easton via the Route 22 toll bridge over the Delaware River that links the two cities. Because of the many people on the bridge, pedestrian traffic spilled over from the sidewalks onto the vehicular roadway and this initially precipitated difficulties as vehicles attempted to negotiate the roadway around the pedestrians, although shortly the bridge was closed to vehicular traffic. Easton police officers -- five K-9 officers accompanied by their canine partners -- arrived on the scene to direct the crowd's movement across the bridge. These K-

---

<sup>2</sup>This is apparently the traditional site for the game.

<sup>3</sup>Near the end of the game, there apparently was a confrontation between Easton police officers and a group of (evidently Phillipsburg) fans who had gathered at the fence separating the stands from the field. Although one of the plaintiffs, Eric Freeman, was involved in the fence incident, none of the plaintiffs' allegations directly stems from that confrontation, and we therefore will eschew a more detailed discussion of this sidelight.

9 officers included defendants Officer John Remaley, Officer Jesse Sollman and Sergeant Michael Weston. Another of the defendants, Captain Douglas Schlegel, was also present at the scene though not part of the K-9 units. The K-9 units arranged themselves in a line across the bridge roadway near the Easton side of the bridge.

At this point, a crowd of approximately two to three hundred people formed in the bridge roadway at about the bridge's center point,<sup>4</sup> and the defendants maintain that a portion of the crowd began to advance on the police. In any event, the police K-9 units then advanced on the crowd, and a melee ensued. Each of the plaintiffs received injuries from a police dog and/or was the subject of police officers exerting physical force. Plaintiff Eric Freeman was ultimately arrested on the bridge and charged with various offenses including Riot, Aggravated Assault, Resisting Arrest, and Escape. Freeman was ultimately acquitted of all charges after a trial before the Northampton County Court of Common Pleas.

## B. Plaintiffs' Allegations

In order to clarify the discussion below, we now outline what claims the plaintiffs have brought against which defendants.

### 1. Alessio Zagra

---

<sup>4</sup>The defendants maintain that this crowd had stopped moving toward Phillipsburg, but the plaintiffs dispute this.

Zagra alleges that as he was walking back across the bridge, he saw the crowd ahead of him stop, at which point the Easton police K-9 units charged the crowd. Zagra contends that he was confronted by defendant Officer John Remaley who screamed at him, tried to move him into the panicked crowd, yelled obscenities at him, and ultimately struck Zagra repeatedly with his baton. Zagra then made his way out of the crowd and walked to the New Jersey side of the bridge. Zagra alleges that his subsequent efforts to file a complaint regarding this incident were rebuffed by the Easton Police Department and that defendant Mayor Goldsmith and defendant Chief of Police Palmer permitted the same officers involved in the bridge incident to conduct the investigation of that event.

Zagra brings a claim under 42 U.S.C. § 1983 (Count I) against defendants Officer John Remaley, Captain Douglas Schlegel, Sergeant Michael Weston, Chief Lawrence Palmer, Mayor Thomas Goldsmith, the City of Easton, and the City of Easton Police Department. Zagra sues the police officer defendants and Mayor Goldsmith both in their individual and official capacities. Zagra claims that these defendants violated his rights through, inter alia, his unlawful detention on the bridge; Remaley's use of excessive force; the development of a policy, practice or procedure designed to allow the use of excessive force; the development of a policy, practice, or procedure that posed a threat to citizens by the negligent retention of personnel; and

the failure to train, supervise, monitor, and control the crowd control actions of the police.

Zagra also asserts a claim of intentional infliction of emotional distress (Count II) against Officer Remaley, Captain Schlegel, Sergeant Weston, Chief Palmer, Mayor Goldsmith, the City, and the Police Department.<sup>5</sup> He contends that the defendants' conduct, within the scope of their employment, was intended deliberately to inflict emotional distress on him.

Zagra further claims assault and battery (Count III) against Officer Remaley, Captain Schlegel, Sergeant Weston, Chief Palmer, Mayor Goldsmith, the City, and the Police Department, stemming from the beating that he allegedly suffered at Officer Remaley's hands.<sup>6</sup>

By an Order dated June 23, 2000, we dismissed Count IV of the Complaint, which alleged negligent infliction of emotional distress.

## 2. Mitchell Ricker<sup>7</sup>

Ricker claims that he was walking across the Route 22 bridge, past the spot at which the Easton K-9 officers were lined

---

<sup>5</sup>Again the police officer defendants and the Mayor were sued individually and in their official capacities.

<sup>6</sup>As to the other defendants, Zagra contends that they precipitated the attack by "condoning, accepting, tolerating, or encouraging" such behavior.

<sup>7</sup>We note as an initial matter that Ricker's Complaint appears to have been closely patterned on Zagra's earlier-filed Complaint.

up, when the K-9 officers charged the crowd. Ricker alleges that he was, without provocation, assaulted by defendant Sergeant Weston, in that Sergeant Weston beat him with a baton and then caused his dog to assault him. The dog allegedly bit Ricker many times on his lower extremities, causing a wound resulting from the dog's several-minute grasp on Ricker's leg. Several other pedestrians pulled Ricker from the roadway and assisted him across the bridge. Ricker further alleges that the police later deliberately stifled any investigation into the incident by threatening to arrest and charge anyone who was present on the bridge and witnessed the event who came forward. Ricker also claims that the police and the Mayor permitted the very men involved in the incident to conduct the police investigation of it.

Ricker asserts his § 1983 a claim (Count I) against Sergeant Weston, Officer Remaley, Captain Schlegel, Chief Palmer, Mayor Goldsmith, the City, and the Police Department, on fundamentally the same grounds as those Zagra alleged.<sup>8</sup> Also in parallel to Zagra's Complaint, Ricker claims intentional infliction of emotional distress (Count II) and assault and battery (Count III) against the same defendants against whom he brought the § 1983 claims.<sup>9</sup>

---

<sup>8</sup>Ricker also bases his § 1983 claims on the alleged use of "deadly force" -- in particular, the use of the police dog.

<sup>9</sup>All of Ricker's claims against the police officer defendants and the Mayor are directed at them in both their  
(continued...)

Count IV of Ricker's Complaint, alleging negligent infliction of emotional distress, was dismissed by our Order dated June 23, 2000.

3. Eric Freeman

Freeman alleges that he was walking eastbound on the Route 22 bridge, using the sidewalk on its northern side, when he observed and heard the K-9 units charge the crowd. Freeman contends that Sergeant Weston was ordering the police to advance on the crowd on the roadway, to use batons, to beat and bite individuals, and to effectuate arrests. Freeman alleges that he saw an Easton police officer, who later turned out to be defendant Officer Jesse Sollman, beating a man who had approached the officer in a non-threatening manner. Freeman claims that he, accompanied by others, then approached the police officer to ask why the man was beaten, and also why dogs had been set upon the crowd. Officer Sollman responded by striking Freeman on the back of the head with his baton, and then setting his dog upon Freeman. Freeman alleges that the dog bit and ripped his lower right leg, and that Sollman gave the dog no command to stop. Freeman attempted to seek medical help from other police officers on the bridge, but was rebuffed. Soon afterward, Captain Schlegel -- who had noticed the bite marks on Freeman's leg --

---

<sup>9</sup>(...continued)  
individual and official capacities.

chased and arrested Freeman, and in the process threw Freeman violently to the ground.

After his arrest, Freeman was jailed for five days on charges of, inter alia, riot, aggravated assault, resisting arrest, and escape. Freeman was acquitted of all charges on January 20, 1999 following a jury trial before the Northampton County Court of Common Pleas. Freeman claims that the charges against him were false, that the police knew that he had committed no offenses, and that the arrest was in fact an effort to cover up police wrongdoing during the incident.

Freeman also claims that the internal investigation of the incident, which resulted in a finding that there was no use of excessive force, was conducted by defendant Captain Edward Zukasky, and that Captain Zukasky, Chief Palmer, and Mayor Goldsmith had, by their actions prior to the incident at issue here, permitted and tolerated officers' pattern and practice of the use of unreasonable force, including acts of Officer Sollman, Officer Remaley, Sergeant Weston, and Captain Schlegel.

Freeman asserts claims under 42 U.S.C. § 1983 for violation of a variety of his constitutional rights. First, he claims that Officer Sollman, Sergeant Weston, and Captain Schlegel violated his First Amendment rights (Count I), contending that his assault by Officer Sollman, subsequent arrest by Captain Schlegel -- both of which resulted from Sergeant Weston's orders -- violated his rights to free speech and to peaceably assemble. Second, Freeman also brings claims under §

1983 for violation of his Fourth Amendment rights against Officer Sollman, Sergeant Weston, and Captain Schlegel, contending that Sergeant Weston's actions in ordering the police actions, Officer Sollman's actions in assaulting Freeman, and Captain Schlegel's actions in arresting him were all violations of Freeman's right to be secure in his person from unreasonable searches and seizures. Third, Freeman claims that Officer Sollman, Sergeant Weston, and Captain Schlegel violated his Fifth and Fourteenth Amendment rights (Count III), in that these defendants' actions served to deprive him of his liberty without due process of law as well as his right to equal protection of the laws. Freeman's fourth § 1983 claim, that the defendants violated his Eighth Amendment rights (Count IV), was dismissed by our Order of June 23, 2000.

Freeman claims that Officer Sollman, Sergeant Weston, and Captain Schlegel violated his rights under Article I of the Pennsylvania Constitution (Count V). In particular, Freeman claims that the defendants' actions violated his right of free speech and to peaceably assemble provided in Article I, Section 7, his right to be secure from unreasonable searches and seizures provided in Article I, Section 8, and his right to be free from the infliction of cruel and unusual punishment provided in Article I, Section 13.

Freeman also asserts a series of common law tort claims against the defendants. Count VI of the Complaint alleges battery against Officer Sollman, Sergeant Weston, and Captain

Schlegel based upon the physical impacts Freeman incurred during the incident. Count VII alleges intentional infliction of emotional distress against Officer Sollman, Sergeant Weston, and Captain Schlegel. Count VIII alleges false imprisonment against Officer Sollman, Sergeant Weston, and Captain Schlegel based upon Freeman's arrest and detention.

Finally, Freeman makes a blanket claim of violation of constitutional rights pursuant to 42 U.S.C. § 1983 against Sergeant Weston, Captain Schlegel, Captain Zukasky, Chief Palmer, Mayor Goldsmith, the City, and the Police Department (Count IX). This claim is based upon the policies, practices, procedures, and customs these defendants allegedly created under which the alleged unconstitutional acts of Officer Sollman, Sergeant Weston, and Captain Schlegel occurred. This claim also asserts, inter alia, that these defendants implemented policies that encouraged police officers to use excessive force and failed to implement the policies contained in the Police Department's use of force policy and canine unit policy. Freeman also says these defendants failed to provide proper direction for police on duty on Thanksgiving Day, 1997, failed adequately to discipline officers who violated use of force directives, failed to adequately train officers in use of force and crowd control, retained and promoted officers known to have violent propensities, and adopted practices allowing biased and cursory internal investigations.

C. Procedural History

Initially, each of the plaintiffs here filed a Complaint in a separate action.<sup>10</sup> Defendants responded to these with motions to dismiss, and by three separate Orders dated June 23, 2000 we granted these motions in part, dismissing Zagra's and Ricker's claims for negligent infliction of emotional distress and dismissing Freeman's claim for violation of his Eighth Amendment rights. By another Order dated June 29, 2000 we consolidated these cases pursuant to Fed. R. Civ. P. 42(a) under C.A. No. 99-5879. The parties proceeded to discovery<sup>11</sup> and after the close of discovery the defendants filed the instant motion.<sup>12</sup>

---

<sup>10</sup>Zagra's Complaint was docketed as 99-5375, Freeman's as 99-5874, and Ricker's as 99-5879.

<sup>11</sup>The contentious tone of discovery in this case can best be appreciated through a review of pages 1 through 12 of the transcript of the telephone deposition of Captain Zukasky, which records the squabbles among counsel both as to the scheduling of the deposition and as to which party was to bear the costs of the phone call to Captain Zukasky.

We should note here that in tandem with his opposition to the instant motion, Freeman's counsel filed an affidavit on the subject of discovery, stating that the defendants have failed to respond to certain document requests served on them on August 28, 2000 as part of Freeman's Second Request for Production of Documents. We will disregard these contentions until such time as they are presented to us in a proper motion to compel.

<sup>12</sup>The defendants filed their motion for partial summary judgment with accompanying memorandum of law on October 5, 2000, pursuant to our scheduling Order of September 11, 2000 and hard on the heels of the completion of discovery. As a result of the parties' inability to cooperate, as documented in our Order of September 11, 2000, many of the depositions in this case were taken at the very end of the discovery period. As a result, defendants' memorandum of law does not contain pinpoint page citations in its references to the depositions. While the defendants' counsel has reported to us her intention to file an

(continued...)

## II. Analysis<sup>13</sup>

In their motion for partial summary judgment, the defendants make fourteen discrete arguments seeking judgment as

---

<sup>12</sup>(...continued)  
amended brief containing these page citations, we note that almost two months has elapsed since the filing of the original memorandum, more than adequate time to obtain transcripts and amend the memorandum of law. In any event, we cannot see how the absence of these citations is cause to further delay the resolution of this motions, and we also find that the absence of pinpoint citations in the defendants' Memorandum does not prejudice the defendants' arguments; to the extent that we below find fault with the defendants' pleadings, this is not associated with the absence of pinpoint citations.

On the other hand, we should also note here that both plaintiff Zagra and plaintiff Ricker flouted our scheduling Order of September 11, 2000 by filing their responses to the motion for partial summary judgment eight and thirteen days, respectively, after the deadline that Order imposed.

<sup>13</sup>A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial,'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

The mere existence of some evidence in support of the nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

to various defendants and various of the plaintiffs' claims. We will address each seriatim.

A. City of Easton Police  
Department's Status as a Proper Defendant

The defendants contend that the City of Easton Police Department is not a proper defendant to these actions because where the Police Department does not have a separate corporate existence from the City, the Police Department is not a proper defendant. The plaintiffs argue<sup>14</sup> that the case law and statutes the defendants cited for this proposition are inapposite and do not control our decision here, and therefore argue that we should not grant judgment as to the Police Department.<sup>15</sup>

Where a police department does not have a corporate existence separate from that of its municipality, the department is not a "person" amenable to suit under 42 U.S.C. § 1983, see, e.g., Capelli v. Haverford Township, No. 98-5983, 1999 WL 144103 at \*1 (E.D. Pa. Mar. 16, 1999); Whichard v. Cheltenham Township,

---

<sup>14</sup>Each plaintiff has filed a separate response to the motion for partial summary judgment. Where the arguments of each plaintiff are similar or identical, we will address them together, though where necessary we will distinguish them.

<sup>15</sup>As an initial matter, we note that plaintiffs are probably technically correct in this argument, in that defendants cited to Baldi v. City of Philadelphia, 609 F. Supp. 162, 168 (E.D. Pa. 1985), which by its own terms appears to refer only to the City of Philadelphia, and to 53 Pa. Con. Stat. Ann. § 35210, which states only that upon the incorporation of the city of the third class, the newly incorporated city inherits the lawsuits then pending against the municipal entities that were incorporated under it. This notwithstanding, however, the defendants clearly have the better of this issue, as the cases cited below demonstrate.

No. 95-3969, 1995 WL 734106 at \*1 (E.D. Pa. Dec. 6, 1995); Johnson v. City of Erie, 834 F. Supp. 873, 878-79 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 825-26 (D.N.J. 1993) (collecting cases from various Circuits so holding); Duvall v. Borough of Oxford, No. 90-629, 1992 WL 59163 at \*2 (E.D. Pa. Mar. 19, 1992). There is no claim here that the Easton Police Department has a separate corporate existence from defendant the City of Easton, and we therefore will dismiss all claims as to the City of Easton Police Department.

B. The Plaintiffs' Claims of Intentional Infliction of Emotional Distress

1. Plaintiffs' Injuries

The defendants argue that none of the plaintiffs can sustain a claim of intentional infliction of emotional distress because none of the plaintiffs can make a showing on the evidence of any "medically-documented physical symptoms". Plaintiffs argue that no such showing is necessary and that they in any event have shown the necessary injuries.

While the Pennsylvania Supreme Court has not expressly recognized a cause of action for intentional infliction of emotional distress, and thus has never formally adopted § 46 of the Restatement (Second) of Torts, the Supreme Court has cited § 46 as "setting forth the minimum elements necessary to sustain such a cause of action," Taylor v. Albert Einstein Med. Ctr., 754

A. 2d 650, 652 (Pa. 2000).<sup>16</sup> In turn, section 46 of the Restatement (Second) of Torts subjects to liability an individual who by "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another," but the section does not itself require a finding of physical injury.

In Kazatsky v. King David Memorial Park, 527 A.2d 988 (Pa. 1987), the Pennsylvania Supreme Court held that a claim of intentional infliction of emotional distress required "expert medical confirmation that the plaintiff actually suffered the claimed emotional distress," Kazatsky, 527 A.2d at 995. But Kazatsky does not require that such confirmation include physical as opposed to psychic injury. Thus, a plaintiff need not show physical injury in order to state a claim for intentional infliction of emotional distress<sup>17</sup>, but does need to provide competent medical evidence of the emotional distress. Moreover, the sort of behavior that gives rise to liability under

---

<sup>16</sup>We note that the analysis here is partially adapted from a similar analysis contained in our Orders of June 23, 2000 considering defendants' motion to dismiss the plaintiffs' claims of intentional infliction of emotional distress.

<sup>17</sup>We recognize that some intermediate appellate courts in Pennsylvania have held on the basis of Kazatsky that physical injury is required to claim intentional infliction of emotional distress, see, e.g., Fewell v. Besner, 664 A.2d 577, 582 (Pa. Super. 1995). However, as neither Kazatsky nor the pertinent section of the Restatement (Second) of Torts requires physical injury, we predict that the Pennsylvania Supreme Court, if presented with this question, would hold that no physical injury showing is required, cf. Kiewit Eastern Co. v. L & R Constr. Co., 44 F.3d 1194, 1201 n.16 (3d Cir. 1995) (noting that our Erie duty requires us to predict how the Pennsylvania Supreme Court would decide the matters before us).

intentional infliction of emotional distress "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society," Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

As noted in the margin above, we arrived at identical legal conclusions in resolving the defendants' motion to dismiss five months ago. Here, the defendants, in arguing that plaintiffs must make a showing of physical symptoms, are implicitly contesting our previous findings, but neither cite to any case law nor make any explicit argument to show why our conclusions should be reconsidered.<sup>18</sup> Thus, on its own terms, and on the same basis as we rejected defendants' motion to dismiss, we reject defendants' motion for summary judgment on this ground.<sup>19</sup>

---

<sup>18</sup>Much less that we should reverse ourselves.

<sup>19</sup>It is the case, as discussed above, that a plaintiff must provide evidence of some expert confirmation of his emotional distress to go forward. In his response, plaintiff Freeman cites to a report by Gerald Cooke, Ph.D. on Freeman's condition, which avers, inter alia, that Freeman is suffering from Post-Traumatic Stress Disorder as a result of his interaction with the K-9 units, see Freeman's Mem. of Law in Opp'n to Mot. for Partial Summ. J. at 32; Ex. [14] to Aff. of Harold J.J. DeWalt, Esq. at 9. It would seem clear, therefore, that Freeman has made the showing of psychic injury sufficient to pursue his claim of intentional infliction of emotional distress. As to Zagra and Ricker, both make reference in their briefs to medical confirmation of their emotional injury, but do not cite to specific reports. However, absent any argument from the parties on this point, we must leave the question of the sufficiency of the plaintiffs' showing of their emotional distress to another day.

## 2. Proper Defendants

Defendants next argue that to the extent that the claims of intentional infliction of emotional distress stand, only certain of the defendants are proper targets of these claims because the requisite showings of intentional or reckless action, or outrageous and extreme behavior, have not been made with respect to various defendants. In particular, defendants maintain that Sergeant Weston is not a proper defendant to Freeman's or Zagra's intentional infliction of emotional distress claims because with respect to these plaintiffs he only gave orders that the K-9 officers disperse the crowd. Similarly, defendants contend, Officer Remaley is not a proper defendant to Ricker's claims. Defendants also argue that there has been no showing that Captain Schlegel, Chief Palmer, Mayor Goldsmith, or the City of Easton has acted with intent to cause emotional distress to the plaintiffs.

For their part, plaintiffs contend that the facts do sufficiently show outrageous and intentional behavior. Ricker notes that we have previously concluded<sup>20</sup> that a defendant need not have engaged in a physical assault on the plaintiff to incur liability for intentional infliction of emotional distress.

We will deny the defendants' motion to grant judgment as to these various defendants. As noted above, in moving for summary judgment, the moving party bears the initial burden of

---

<sup>20</sup>In our Order dated June 23, 2000.

showing that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), with all evidence viewed in the light most favorable to the nonmoving party, see id. at 587. Here, the defendants' motion consists essentially of the bare statement<sup>21</sup> that there is no evidence to inculcate certain defendants as to the claims of intentional infliction of emotional distress. While we appreciate that proving a negative is difficult, we cannot accept such a skeletal argument to support so broad a claim as the defendants assert here.<sup>22</sup>

#### C. Monell Claims Against the City

Defendants argue that there is no liability under 42 U.S.C. § 1983 for the City of Easton here pursuant to Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978). In particular, defendants note that the plaintiffs base their claims against the City on the fact that the officers on the bridge acted contrary to a previously-established policy for dealing with the crowds on the bridge following events such as the Easton-Phillipsburg football games. Defendants argue that the

---

<sup>21</sup>Defendants' argument with respect to this issue occupies only nine lines of text in their brief.

<sup>22</sup>Plaintiffs' arguments on this point win no prizes for advocacy, either, as for the most part they consist simply of statements that the facts as presented in their briefs' statements of the case show that the defendants are in fact liable. However, since the defendants failed to carry their burden, the potential inadequacy of the plaintiffs' responses does not enter into our analysis.

evidence in fact shows that there is no formally established policy regarding the conduct of crowd movement over the bridge, and that the police practices in years prior to the events at issue had in fact resembled those followed in 1997.<sup>23</sup> Moreover, defendants contend that even if the police had violated some policy or practice on Thanksgiving Day 1997, Monell liability cannot lie against the City because a failure to train is not established by a single incident of police misconduct.

In response, the plaintiffs argue that their claim that the police failed to follow established practices with respect to crowds crossing the bridge is only one part of their Monell claims. They contend that the police actions on the bridge were in violation of a number of established policies of the Easton Police Department for crowd control in general.

In order to place these arguments in context, we first review the law surrounding municipal liability for § 1983 claims. Under § 1983, municipalities do not have respondeat superior liability for the acts of their agents. Instead, liability under § 1983 will lie for a municipality "when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

---

<sup>23</sup>The plaintiffs alleged that in the years prior to 1997, the Easton police had utilized a number of practices for dealing with the crowds on the bridge (for example, the use of police in riot gear instead of or in addition to the K-9 units, the use of megaphones so that the whole crowd could hear police orders, and closing the bridge to automotive traffic in advance) that had prevented incidents like the one at issue, but that these practices had not been followed in 1997.

official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978). That is, the plaintiff must show that the official policy or custom caused the deprivation of a constitutionally-protected right, see id. at 690; Beck v. City of Pittsburgh, 89 F.2d 966, 972 n.6 (3d Cir. 1996) ("The plaintiff bears the burden of proving that the municipal practice was the proximate cause of the injuries suffered.").

Our Court of Appeals has identified two ways in which a government policy or custom can be established:

Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, such practices of state officials [are] so permanent and well settled as to virtually constitute law.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations and internal quotation marks omitted).

Moreover, "[i]n either of these cases, it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom." Id.<sup>24</sup>

---

<sup>24</sup>The precise degree of culpability that must be shown in a "policy or custom" case is not clear from our Court of Appeals's jurisprudence. In Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996), the court noted that the standard requiring a showing "deliberate indifference" to the rights of those persons (continued...)

When a Monell claim against a municipality concerns a policy of failure to train or supervise municipal employees,

liability under section 1983 requires a showing that the failure amounts to "deliberate indifference" to the rights of persons with whom those employees will come into contact. City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197 (1989).

The Court in Canton observed that failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights. See id. at 389, 109 S. Ct. 1197. For example, if the police often violate rights, a need for further training might be obvious. See id. at 390 n.10, 109 S. Ct. 1197. See also [Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989)] (deliberate indifference may be established where harm occurred on numerous previous occasions and officials failed to respond appropriately, or where risk of harm is great and obvious).

. . . .  
[I]n order for a municipality's failure to train or supervise to amount to deliberate indifference, it must be shown that (1) municipal policymakers know that employees

---

<sup>24</sup>(...continued)

affected that was initially developed in the context of inadequate training of law enforcement officers, see City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989) (setting forth the deliberate indifference standard), had been adopted in other policy and custom contexts, see Beck, 89 F.3d at 972. Beck, however, went on to note that Bielewicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) required only proof of the custom and causation, see Beck, 89 F.3d at 972, leaving open the question of whether the higher "deliberate indifference" standard is appropriate outside the "inadequate training" circumstance. Other cases in this District have taken the Beck language to mean that a custom or policy must exhibit deliberate indifference, see, e.g., Basile v. Elizabethtown Area Sch. Dist., 61 F. Supp.2d 392, 405 (E.D. Pa. 1999); Estate of Henderson v. City of Philadelphia, No. 98-3861, 1999 WL 482305 at \*18 (E.D. Pa. July 12, 1999). We need not resolve this difference for the purposes of the present motion.

will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights. See [Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992)].

Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999)(footnote omitted).<sup>25</sup>

We first observe that the plaintiffs are correct in asserting that the police's alleged failure to follow established policies in their actions on the bridge is not the only Monell claim they level against the City. The applicable counts of the plaintiffs' Complaints (Count I in Zagra's Complaint, Count I in Ricker's, Count IX in Freeman's) also include, inter alia, allegations that the City had a policy or custom of (1) negligently retaining and negligently assigning police personnel, (2) failing to train its officers in crowd control, and in fact (3) encouraging the use of excessive force. Thus, to the extent that the defendants here argue that the practices on the bridge did not violate any previously established scheme for the control

---

<sup>25</sup>Similarly, "a failure to train, discipline, or control can only form the basis for section 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Montgomery v. DeSimone, 159 F.3d 120, 127 (3d Cir. 1998) (citing Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997)).

of Thanksgiving Day crowds<sup>26</sup>, such an argument hardly goes to all of the Monell claims that the plaintiffs make. Even if we were to agree with the defendants on that point, it still would not justify a judgment for the defendants on the Monell claims in general.

As noted above, the defendants also contend that with respect to any "failure to train" claims the plaintiffs raise, there could be no Monell liability because such liability cannot be based on a single incident of misconduct. We recognize that it is the case that "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city," City of Canton, 489 U.S. at 390, 109 S. Ct. at 1206. However, here the allegation appears to be not just that a single officer was badly trained, but rather that the entire police chain of command was ignorant of and untrained in the Department's own policies for proper crowd control. Thus, while the events at issue here were in a sense one "incident", it would seem that there may be more than one "incident" of a failure to train comprehended within it. The defendants'

---

<sup>26</sup>In any event, it does not appear that the plaintiffs are relying on the police department's failure to adhere to a policy or practice specific to a situation involving crowds on the Route 22 bridge. Instead, plaintiffs argue that the orders the police hierarchy gave for crowd control on the bridge were contrary to the Department's own guidelines on general crowd control. Thus, the defendants' argument that the behavior in 1997 was not dissimilar from police behavior in prior years does not necessarily run contrary to the plaintiffs' argument regarding the police failure to follow policy.

argument for granting judgment on the failure to train issue must consequently fail.

D.     Claims Against Chief Palmer and Mayor  
          Goldsmith in Their Individual Capacities

Defendants argue that we should dismiss all § 1983 claims against Chief Palmer and Mayor Goldsmith in their individual capacities. In support, defendants maintain that neither Chief Palmer nor Mayor Goldsmith had any personal involvement in the actions associated with the plaintiffs' injuries. Specifically, they argue that Chief Palmer and Mayor Goldsmith did not participate in the actions on the bridge, nor, for that matter, did they participate "in any activity which caused legally cognizable harm to any of the plaintiffs," Defs.' Mem. of Law in Supp. of Mot. for Partial Summ. J. at 19.

As we noted in our Orders resolving defendants' motions to dismiss plaintiffs' Complaints, supervisors may be held liable for police misconduct if the plaintiff establishes a causal connection between the supervisor's actions and the unconstitutional police activity, see Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981). Supervisors who were not actually present at the scene may be held liable for "directing, encouraging, or acquiescing in the unlawful activities," Michael Avery et al., Police Misconduct § 4:8 at 4-15 (3d ed. 1999), see also Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253, 263 (3d Cir. 1995) (supervisor may be liable under § 1983 if he knew of a subordinate's unconstitutional activity and approved it); Baker

v. Monroe Township, 50 F.3d 1186, 1191 (3d Cir. 1995) (one could be held liable under § 1983 if one directed others to violate plaintiffs' rights or had knowledge of one's subordinates' violations); but cf. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (liability under § 1983 cannot be predicated on a theory of respondeat superior).

Here, we again find that the defendants' motion fails to meet the initial burden of showing -- viewing evidence in the light most favorable to the plaintiff -- that no genuine issue of material fact is in dispute. Simply because a supervisor like Chief Palmer or Mayor Goldsmith was not present at the scene of an unconstitutional act does not necessarily absolve the supervisor of individual liability under § 1983. Thus, Palmer's and Goldsmith's absence at the bridge does not suffice to show they have no liability.

We are therefore left with the defendants' assertion that neither man participated in any activity causing harm to the plaintiffs. This bare assertion, however, unaccompanied by any citation to the record or discussion of the extent of their actual involvement in the events of this case, cannot suffice to show that there is no disputed fact barring judgment in their favor. Again, we are keenly aware of the difficulties a party faces in proving a negative -- here, that Palmer and Goldsmith didn't harm the plaintiffs -- but we cannot find a one-sentence

claim of an absence of liability sufficient to shift the burden over to the plaintiffs.<sup>27</sup>

---

<sup>27</sup>The lack of such argument is particularly striking where the discussion of the law in our previous Order should have alerted the defendants to the subtleties of this area of jurisprudence.

Leaving aside the defendants' failure to meet their burden, we note that the plaintiffs cite to evidence showing Palmer and Goldsmith's personal involvement in, for example, decisions regarding retention and promotion within the Police Department, Captain Schlegel's promotion despite his record, and decisions regarding the internal investigation here. See, e.g., Goldsmith dep. at 14-26, 53-55, and 98-103. See also Siegfried v. City of Easton, 146 F.R.D. 98 (E.D.Pa. 1992)(prior § 1983 suit against Schlegel). It is therefore far from clear that the defendants would be able, even with more extended argument, to show that Palmer and Goldsmith were uninvolved in any actions alleged to have harmed the plaintiffs. In any event, we need not now address this question.

E. Qualified Immunity

Defendants argue that Captain Schlegel, Captain Zukasky, Chief Palmer, Mayor Goldsmith, and the City of Easton are shielded from liability for the plaintiffs' § 1983 claims on the basis of qualified immunity, and they argue that Sergeant Weston is similarly shielded from such liability from Zagra and Freeman's claims since he was not alleged to have physically assaulted these two plaintiffs. In particular, defendants argue that the plaintiffs had no clearly established right that these defendants would have reasonably understood their actions to violate. Defendants contend that the City and Department policies are not in dispute, but rather merely that certain individual officers violated the policies in effect, and that therefore Weston (with respect to Zagra and Freeman), Schlegel, Zukasky, Palmer, Goldsmith and the City all enjoy qualified immunity's shield.

In response, Freeman and Zagra<sup>28</sup> argue first that qualified immunity only applies to discretionary functions of government officials, and that, with the exception of the defendant Schlegel's actions, all of the acts at issue were strictly ministerial in nature. Second, Freeman and Zagra argue that there can be no question that the rights whose violation Freeman and Zagra allege were clearly established, and that there is a genuine issue of material fact as to whether the defendants

---

<sup>28</sup>The argument on this issue in Zagra's brief is identical to that in Freeman's earlier-filed brief.

acted in a reasonable manner in view of the existing law and the facts known to them.

Plaintiff Ricker also argues that the defendants' actions were ministerial, and thus not deserving of qualified immunity. He also contends that the plaintiffs' claims go beyond allegations of a failure to train, and instead include, inter alia, a failure properly to implement crowd control procedures, failure adequately to discipline police officers for policy violations, failure adequately to discipline police officers for the use of excessive force, and a failure properly to investigate claims of misbehavior by police officers. Therefore, Ricker avers, the defendants cannot claim qualified immunity.

Public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); see also Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039 (1987) (holding that the focus of qualified immunity is on the objective legal reasonableness of the actions taken by the public official). Qualified immunity may apply to "discretionary" acts, where "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions," Harlow, 457 U.S. at 816, 102 S. Ct. at 2737. Qualified immunity does not apply, however, to actions that are "ministerial", that is, that are established by

regulation, see, e.g., Davis v. Scherer, 468 U.S. 183, 196 n.14, 104 S. Ct. 3012, 3020 n.14 (1984) (noting that the requirement to follow certain procedures before terminating employment is an example of a ministerial duty).<sup>29</sup> Moreover, a municipality in its official capacity can raise no claim of qualified immunity, see Owen v. City of Independence, 445 U.S. 622, 650, 100 S. Ct. 1398, 1415 (1980); Grant v. City of Pittsburgh, 98 F.3d 116, 126 n.7 (3d Cir. 1996).<sup>30</sup>

When a § 1983 defendant raises a claim of qualified immunity, the first question we face is whether the plaintiff's allegations sufficiently establish the violation of a constitutional or statutory right, see Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). If the allegations cross that threshold, we next inquire as to whether the right was clearly established such that a reasonable person would have been aware of it, see Gruenke, 225 F.3d at 298. We then move to examine the defendants' conduct. As noted above, "an official will not be liable for allegedly unlawful conduct so long as his actions are objectively reasonable under current federal law," Gruenke, 225 F.3d at 299, and the focus is on "whether a reasonable public official would know that his or her specific conduct violated

---

<sup>29</sup>See also Ospina v. Department of Corrections, 769 F. Supp. 154, 156 (D. Del. 1991) (noting that ministerial duties are "routine procedures necessary to the administration of the law that call for little or no choice").

<sup>30</sup>We therefore reject out of hand defendants' claim that the City of Easton should be afforded qualified immunity.

clearly established rights," Grant, 98 F.3d at 121. At the summary judgment stage, "this admittedly fact-intensive analysis must be conducted by viewing the facts alleged in the light most favorable to the plaintiff," Gruenke, 225 F.3d at 300.

We begin with the plaintiffs' arguments regarding the defendants' ministerial duties. Plaintiffs do not specify exactly what these ministerial duties comprised, nor how the entirety of the defendants' alleged bad acts fall into this category.<sup>31</sup> In any event, it would appear that these claims are grounded in the position that many of the defendants' acts, including the deployment and use of the K-9 units, Freeman's treatment after his arrest<sup>32</sup>, and the conduct of the investigation were all in violation of certain Police Department policies. However, even to the extent that this may be in some sense true, it is nonetheless the case that the simple fact that policies exist to give guidance to police action does not render decisions

---

<sup>31</sup>Here again, as with other portions of this Memorandum, our analysis on this analysis has been handicapped by the extraordinary absence of specificity in all parties' briefs. The parties persist in the practice of arguing through conclusory statements supported by generalized reference to the extensive statements of fact with which they each open their briefs. This places us in the unwelcome position of having to search through the parties' claimed fact sets in search of the information that supports their arguments. While we will engage in this enterprise to a certain extent, as the Court of Appeals for the Seventh Circuit has observed in a slightly different context, "[j]udges are not like pigs, hunting for truffles buried in briefs," United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam).

<sup>32</sup>In particular, whether he should have been taken for medical treatment of his bite wounds prior to being processed at the police station.

regarding, for example, the deployment of police officers, or the conduct of an investigation, or the promotion and retention of officers, purely "ministerial" acts. Thus, in the absence of more explicit argument from the plaintiffs, the defendants' actions are not ministerial.

Regarding the application of qualified immunity, we consider as initial matters whether the plaintiffs have alleged violations of constitutional rights and, if so, whether the alleged violations of plaintiffs' rights were clearly established. In their motion for summary judgment, the defendants stake out no claim that rights violations were not alleged or that the rights were not clearly established. Instead, the motion for summary judgment focuses on the defendants' actions, and so we will move on to that portion of the analysis.<sup>33</sup>

Defendants argue that defendants Schlegel, Zukasky, Palmer, Goldsmith, and Weston (with respect to Zagra and Freeman's claims) should be granted qualified immunity because

[t]he policies themselves are not in dispute; rather, plaintiffs argue that the individual officers who came in contact with the

---

<sup>33</sup>In the interests of completeness, we observe that the plaintiffs have all alleged violations of at least their Fourth Amendment rights in conjunction with their claims that the police used excessive force. (To the extent that plaintiffs allege violations of other constitutional rights, these claims arise from the same basic acts of the defendants, and so the issue of whether these claims are proper, which we will address below, does not affect the qualified immunity analysis.) It would seem quite clear that these rights are quite well established such that the defendants would reasonably have been aware of them.

plaintiffs acted in derogation of established policies. None of the above-identified defendants are alleged to have failed in their policy-making skills, nor do the facts support a claim that they failed in their supervisory duties on Thanksgiving Day, 1997.

Defs.' Mem. of Law in Supp. of Mot. for Partial Summ. J. at 20.

We initially observe that this argument is somewhat incomplete, in that it fails to address a number of the theories that the plaintiffs are pursuing here, most notably that the defendants failed properly to screen officers for promotion and retention, and that this failure ultimately resulted in the excessive force used on the plaintiffs. Also, while the statement that none of the defendants is alleged to have failed in policy-making is true to an extent -- to wit, as plaintiffs make allegations that the police officers violated certain policies in their conduct on and subsequent to Thanksgiving Day, 1997, the plaintiffs are not taking issue with the content of the policies themselves -- there is other wrongdoing alleged against the defendants unassociated with the policy formation. Thus, even were we to accept the defendants' arguments in their motion as true, it would not necessarily justify a grant of qualified immunity to the defendants. We therefore decline to find that the defendants have qualified immunity from the plaintiffs' claims.<sup>34</sup>

---

<sup>34</sup>In the interests of completeness, we will review some of the facts elicited through discovery regarding the action of each of the defendants seeking qualified immunity.

We begin with Sergeant Weston. As defendants note,  
(continued...)

F. Ricker's Claims Against Officer Remaley

Defendants argue that there is no evidence that Officer Remaley interacted at all with plaintiff Ricker or contributed to Ricker's harm. In support, they note that nothing in Ricker's

---

<sup>34</sup>(...continued)

Sergeant Weston is not alleged to have physically assaulted Zagra or Freeman. However, he is the officer in charge of the K-9 units and it was he who gave the order for the K-9 units to charge the crowd, an order that precipitated the events at issue here. On the conflicting evidence before us regarding the behavior of the crowd and other circumstances surrounding the incident, we cannot conclude that these actions were objectively reasonable in view of the federal law surrounding the use of police force.

Captain Schlegel's report of the incident states that because of the crowd's behavior at the game, he anticipated problems on the bridge. To address his concern, he sent two additional K-9 units to the bridge to add to the three units who had previously been assigned to the bridge. See Ex. D, Mot. for Partial Summ. J. Schlegel did not, however, assign any other officers to support the K-9 units, although he himself was later present on the bridge. While on the bridge, he chased, tackled, and arrested plaintiff Freeman in part because he was displaying a bite on his leg, which Schlegel believed to demonstrate that Freeman had previously engaged in illegal activity. Again, on the conflicted facts before us we cannot say that these acts were objectively reasonable.

According to plaintiff Freeman's testimony, Captain Zukasky was one of the officers who failed to render proper treatment to him while he was in custody at the Easton police department following his arrest. Moreover, Captain Zukasky's deposition testimony shows that his inquiry into the events that transpired on the bridge was at least arguably incomplete. We cannot find as a matter of law that these acts are worthy of qualified immunity.

With respect to Chief Palmer and Mayor Goldsmith, the Mayor is ultimately responsible for approving promotions within the police department, which are recommended to him by the Chief of Police. Here, there is evidence that Captain Schlegel was promoted despite a history of allegations of excessive force against him and the fact that he had once been fired as a result of an off-duty incident of violence (though he had ultimately been reinstated). We cannot find that this act was objectively reasonable in light of federal law.

deposition suggests any involvement by Remaley, and that it was Sergeant Weston and his canine partner who are alleged to have physically attacked Ricker.<sup>35</sup> In response, Ricker points to the finding in our Order of June 23, 2000 that to be held liable for the tort of assault and battery, it is not necessary that a defendant actually strike the plaintiff, but rather that liability may lie with one who behaved with common design or in mutual aid with one who did strike the plaintiff.

As the defendants argue, there is no mention whatever in Ricker's deposition of any wrongdoing that Officer Remaley did to him. The statement of facts that opens Ricker's brief in opposition to summary judgment contains nothing to inculcate Remaley in any of the acts against Ricker. Similarly, there is nothing in Officer Remaley's report of the incident to suggest that he did anything to affect Ricker,<sup>36</sup> and since Officer Remaley was at the bottom of the chain of command, there is no

---

<sup>35</sup>While this argument is not made in great detail, the issue here is quite focused: was or was not Officer Remaley involved with the assault on plaintiff Ricker or with other violations of Ricker's rights? Thus, we find that the defendants' motion with respect to this issue does carry the initial summary judgment burden, where, as noted above, some of their arguments as to somewhat larger issues do not.

<sup>36</sup>The report appears somewhat candid regarding Remaley's interaction with Zagra (identified in the report as a "white male"). Remaley reports that he told Zagra to "get the fuck off the bridge right now" and struck Zagra on the legs with his baton in order to get Zagra to walk, see Report of Officer John Remaley dtd Dec. 3, 1997, Ex. E, Mot. for Partial Summ. J. Ultimately, Remaley was disciplined for his use of obscenity. Given the frankness of this portion of the report -- a frankness that earned Remaley punishment -- it is difficult to imagine that Remaley would have failed to report an interaction with Ricker.

basis for any finding that he directed Sergeant Weston (his superior) to act in any way towards Ricker.

With respect to Ricker's argument, while it is the case that a defendant can be liable for battery without striking the plaintiff, at the summary judgment stage it is incumbent on the plaintiff to point to facts elicited in discovery to show that there is some dispute of material fact that must be resolved by the jury. Here, the simple possibility that Remaley could theoretically have been associated with the battery on Ricker is not sufficient to permit the claim to survive summary judgment where there is evidence that there was no involvement at all, and we will therefore grant this aspect of the defendants' motion.

G. Ricker and Zagra's Assault and Battery Claims

Defendants next argue that in order to be liable for assault and battery a defendant must personally touch or threaten the plaintiff, and that consequently only Officer Remaley is a proper defendant to Zagra's assault and battery claim and only Sergeant Weston is a proper defendant to Ricker's assault and battery claim.

As an initial matter, we take issue with the predicate of the defendants' argument. As we observed in our Order of June 23, 2000 resolving the defendants' motion to dismiss, defendants who behave by common design or mutual aid in bringing about an injury to the plaintiff may all be liable for assault and battery even if only one defendant actually struck the plaintiff, see,

e.g., Keich v. Frost, 63 Pa. D & C.2d 499, 501 (C.C.P. Dauphin Cty. 1973). Moreover, although defendants cite in support of their proposition to DiJoseph v. City of Philadelphia, 947 F. Supp. 834, 844 (E.D. Pa. 1996), as we noted in our June 23, 2000 Order, that case's holding does not inform our decision here, as the facts there are not comparable to those here.<sup>37</sup> We thus cannot accept the contention that simply because certain of the defendants did not strike or threaten Zagra or Ricker, we should grant judgment as to these defendants.

This notwithstanding, we find that the battery allegations against the City of Easton, Chief Palmer, and Mayor Goldsmith cannot survive summary judgment. With respect to the City, "[w]here a plaintiff has averred willful misconduct on the part of local agency employees, [42 Pa. Con. Stat. Ann. §

---

<sup>37</sup>In particular, we noted that in DiJoseph the court granted summary judgment on allegations of assault and battery to two police officers, Mattiacci and Hairston, on the ground that they "did not touch or threaten" the plaintiff. However, those two officers were not situated similarly to the defendants here. In DiJoseph, the plaintiff, DiJoseph, claimed that the police used excessive force in shooting him during an incident in which DiJoseph claimed to be holding an individual at gunpoint inside DiJoseph's own house. Officers Mattiacci and Hairston were not involved in the shooting; rather, they had, after an earlier investigation of DiJoseph, returned to DiJoseph the weapon he later used in the incident, and these officers subsequently responded to the radio call reporting the hostage situation. There was no suggestion in DiJoseph that Officers Mattiacci or Hairston had directed, encouraged, or condoned the subsequent shooting of the plaintiff by another police officer. Thus, that these officers were granted judgment on allegations of assault and battery does not compel a similar result here.

We are at a loss to understand why the defendants would pursue this argument in the instant motion when we clearly found DiJoseph to be completely inapposite to the circumstances here.

8542(a)(2)] bars recovery from the local agency because liability may be imposed on the local agency only for negligent acts," Petula v. Mellody, 631 A.2d 762, 765 (Pa. Cmwlth. 1993). While 42 Pa. Con. Stat. Ann. § 8550 permits suits against the employees of local agencies based on the employees' willful acts, § 8550 does not by its own terms create any exception to 42 Pa. Con. Stat. Ann. § 8542, which establishes the conditions under which a local agency may be held liable under tort law.<sup>38</sup> Consequently, there can be no action in tort for battery against the City of Easton.

As to Chief Palmer and Mayor Goldsmith, there is no dispute that these men were not present at the bridge or the game on Thanksgiving Day 1997, nor that they personally had any direct involvement with the assignment or deployment of officers to the game or its aftermath. Thus, we cannot say that any reasonable jury could find that these two men acted in common design or mutual aid<sup>39</sup> with the police officers on the bridge in causing

---

<sup>38</sup>That is, § 8542 provides the exceptions to sovereign immunity under which a local agency may be sued in tort. Intentional torts such as battery are not excepted under this provision. While § 8550 opens local agency employees to suit for intentional torts, it does not do so for the local agencies themselves.

<sup>39</sup>Zagra argues that "all who aid, abet, counsel, or encourage the assailant by words, gestures, looks or signs are, with the assailant, equally liable for battery to the injured party regardless of whether their motive was malicious," Zagra's Mem. of Law in Opp'n to Mot. for Partial Summ. J. at 33. Under this standard it is equally clear that while the other officers on the bridge may be liable for the batteries, Chief Palmer and Mayor Goldsmith, who were well beyond the range of "words,

(continued...)

the batteries that Zagra and Ricker have alleged. We will therefore grant them judgment as to Count III of Ricker's Complaint and Count III of Zagra's.

H. Captain Zukasky as a  
Defendant to Freeman's Complaint

The defendants argue that Captain Zukasky is not a proper defendant to plaintiff Freeman's Complaint.<sup>40</sup> Defendants argue that the evidence elicited in discovery fails to show that Captain Zukasky interacted with Freeman in any way, or contributed to any harm Freeman suffered, and that it shows that Zukasky was neither involved in the policies leading up to the incident on the bridge nor responsible for assigning officers to the bridge detail. Thus, defendants aver, there are no grounds for § 1983 claims against Captain Zukasky.

In response, Freeman points out that Freeman's deposition testimony included the statement that Captain Zukasky was present at the police station when Freeman was transported there after his arrest. Freeman avers that Zukasky treated him in a "rude and vulgar" manner and that Freeman should in any event have been taken first to a hospital to address his injuries instead of transported to the police station. We find that given Zukasky's rank -- third in command of the department, see Dep. of

---

<sup>39</sup>(...continued)  
gestures, looks, or signs", cannot be.

<sup>40</sup>Freeman was the only plaintiff to name Captain Zukasky as a defendant.

Edward J. Zukasky at 20-21 -- he is implicated in Freeman's claims that he was denied proper medical treatment in violation of his constitutional rights. Further, it is undisputed that it was Captain Zukasky who conducted the department's investigation into the events on the bridge, and, as noted above, the arguably cursory conduct of that investigation also tends to make Zukasky a proper defendant in that he may have been involved in the violation of Freeman's rights. Therefore, defendant's bare argument that Zukasky is an improper defendant does not warrant summary judgment here.<sup>41</sup>

#### I. Freeman's First Amendment Claim

Defendants contend that Freeman's alleged assault and arrest were not in response to any protected speech activity or any peaceable assembly and that consequently there is no valid § 1983 claim for violation of Freeman's First Amendment rights.

In general, to recover under 42 U.S.C. § 1983, a plaintiff must first prove that he was deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 140, 99 S. Ct. 2689, 2692 (1979); see also Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913 (1981). Having demonstrated a deprivation of rights, a plaintiff must then prove that the

---

<sup>41</sup>We note that there are other legal questions implicated by the allegations against Zukasky, among them whether his arguably incomplete investigation can give rise to § 1983 individual liability, but as defendant has not raised them, we shall not sua sponte open such lines of inquiry.

defendant deprived him of these constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Monroe v. Pape, 365 U.S. 167, 171-88, 81 S. Ct. 473, 475-85 (1961). Thus, a threshold inquiry with respect to Count I of Freeman's Complaint is whether the police activity here violated his First Amendment rights.

Here, defendants contend that Officer Sollman first attempted to arrest Freeman because Freeman refused to obey orders to disperse during the confrontation on the bridge and because he made threatening gestures towards Sollman and his canine partner. Defendants maintain that Freeman's comments at the time were "fighting words", not protected speech, and note that Captain Schlegel later arrested Freeman for attempting to incite a riot, among other charges. Thus, defendants claim there was no protected speech and no peaceable assembly, and thus no possible First Amendment violation.

We first examine the basic principles of First Amendment protections for speech.

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 2542-43 (1992) (citations and internal quotation marks omitted).

Moreover, "the constitutional guarantees of free speech . . . do not permit [the government] to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). On this standard, the Supreme Court reversed the disorderly conduct conviction of a man who was heard to say "We'll take the fucking street again" in the presence of a sheriff during an anti-war protest, finding that such a statement "at worst, amounted to nothing more than advocacy of illegal action at some indefinite future time," Hess v. Indiana, 414 U.S. 105, 107-08, 94 S. Ct. 326, 328 (1973).

Similarly, the doctrine of "fighting words" renders unprotected "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," Cohen v. California, 403 U.S. 15, 20, 91 S. Ct. 1780, 1785 (1971) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942)), though this doctrine's reach is limited to "words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed," Gooding v. Wilson, 405 U.S. 518, 524, 92 S. Ct. 1103, 1107 (1972). There are limits

to this standard. In an analysis noting the "fighting words" doctrine, the Supreme Court reversed the conviction of a Louisiana resident who, in exclaiming to a police officer, "you god damn m[other] f[ucking] police", was cited for violating a New Orleans ordinance making it unlawful "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty," Lewis v. City of New Orleans, 415 U.S. 130, 131 n.1 & 132, 94 S. Ct. 970, 971 n.1 & 972 (1974).

We must therefore examine Freeman's behavior in light of this jurisprudence to determine if his speech was protected, though in so doing we must of course view the evidence before us in the light most favorable to the plaintiff. Freeman testified that he was on the northern bridge walkway, proceeding towards Phillipsburg, when he saw a man -- who Freeman later discovered to have been plaintiff Zagra -- step out from the crowd in the roadway and approach a police officer, see Dep. of Eric Freeman at 56-57. Freeman stopped to watch what was happening and saw an Easton police officer hit Zagra in the chest with a baton and push Zagra to the barrier dividing the walkway from the roadway, see Dep. of Eric Freeman at 57-58. Freeman then headed towards the police officer to "see what was going on," but was intercepted by another officer who jumped the barrier onto the walkway and told Freeman to turn around, Dep. of Eric Freeman at 58-59. Freeman started to question this, but thought better of it, turned around, and walked away, at which point the police

officer hit him in the back of the head with his baton, see Dep. of Eric Freeman at 59-60.

Freeman then kept moving on the walkway towards Phillipsburg and after twenty or thirty yards came upon a crowd of about fifty people that had formed, see Dep. of Eric Freeman at 63-66. Freeman saw several K-9 units jump the barrier from the roadway to the walkway, and saw one of the units (including the police officer and his dog) directly approach him, see Dep. of Eric Freeman at 69-70. Freeman and several others "confronted" the officer, "asking him why he was doing what he was doing," Dep. of Eric Freeman at 70. The officer told Freeman to turn around and keep going, Freeman stood his ground and continued to ask the officer, "What the hell are you doing?" Dep. of Eric Freeman at 71. The officer and the dog continued to move toward Freeman, and Freeman told the officer "get the dog away from me," Dep. of Eric Freeman at 74. Ultimately, the dog grabbed at Freeman with its mouth, Freeman fell down, the dog bit Freeman on the leg, and after a struggle Freeman ran away, see Dep. of Eric Freeman at 75-78. With respect to this series of events, Officer Sollman's report contends that Freeman said to him, "fuck you mother fucker, we're not fucking leaving, fucking asshole," Report of Officer Sollman, Ex. C, Mot. for Partial Summ. J. at 2.

Freeman then proceeded across the bridge towards Phillipsburg, and approximately forty yards from the Phillipsburg side of the bridge he stopped to show a Phillipsburg police

officer the injury to his leg, see Dep. of Eric Freeman at 88-89. At this point, Captain Schlegel saw him, chased him down, and arrested him, see Dep. of Eric Freeman at 90. With respect to these latter events, the defendants maintain that Freeman was displaying his dog bite to the crowd, stating loudly, "if you don't [move], look what can happen to you," or words to that effect, see Report of Captain Schlegel, Ex. D, Mot. for Partial Summ. J. at [6].

Viewing the facts in the light most favorable to plaintiff Freeman, we cannot conclude that his speech to the officers was unprotected. First, we cannot conclude that Freeman's remarks to Officer Sollman, even as the defendants report them, are "fighting words", since even if Freeman did refer to Sollman as a "mother fucker," or a "fucking asshole" these epithets are not sufficient to have a direct tendency to cause a violent response.<sup>42</sup> The analysis is similar with respect to Freeman's later statement to the effect that, "if you don't move, this will happen to you"; although this might have been directed at the crowd, we cannot conclude that it incited or produced imminent lawless action or was likely to incite or produce such action.

Defendants also contend that there is no First Amendment violation here because Freeman's speech was not the

---

<sup>42</sup>Again, we note that Freeman did not testify to having made these statements, and so it is unclear that they are even before us for consideration, taking inferences for Freeman.

cause of his arrest. On the contradictory testimony before us, we cannot find that conclusion warranted taking all inferences for Freeman.

Finally, defendants argue that even if the First Amendment claims stand, Sergeant Weston is not a proper defendant to them, in that he only issued the initial order to the K-9 units. However, Weston's command directing the K-9 units to charge the crowd initiated Officer Sollman's action here, and at this stage we cannot conclude that Weston's acts were not causally linked with the alleged First Amendment violation.

J. Sergeant Weston as a Defendant to  
Counts II and VI of Freeman's Complaint

The defendants contend that Sergeant Weston is not a proper defendant to either Count II (alleging the use of excessive force in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983) or Count VI (alleging battery) of Freeman's Complaint. In support of this contention, defendants again cite to DiJoseph v. City of Philadelphia, 947 F. Supp. 834 (E.D. Pa. 1996) for the proposition that one who does not physically impact a plaintiff cannot be held liable for the battery. So too, defendants aver, an officer who did not strike the plaintiff cannot be held liable under § 1983.

These arguments are untenable. As discussed above, DiJoseph does not apply to this case, and Pennsylvania law permits a finding of liability for battery against defendants who aided or abetted the battery even if they did not physically

impact the plaintiff. Moreover, to the extent that it was Sergeant Weston who ordered the K-9 units to charge the crowd on the bridge, he is a proper defendant in the § 1983 action.

K. Freeman's Due Process Claims

Defendants argue that they deserve judgment as to the claims in Count III of Freeman's Complaint alleging a violation of his substantive due process rights because all of Freeman's claims are properly analyzed in the rubric of the Fourth Amendment. We note that the defendants raised an identical claim in their previous motion to dismiss.<sup>43</sup>

As we noted in examining this issue in our Order of June 23, 2000, "[A]ll claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process'<sup>44</sup> approach," Graham v. Connor, 490 U.S. 386, 395, 109 S.

---

<sup>43</sup>In fact, the argument on this point in defendants' brief is a word-for-word replication of their argument in the Rule 12(b)(6) context, except for the addition of "Further, no facts have been produced during discovery to support any claim that Freeman's substantive due process rights were violated, inasmuch as he testified that he was provided with the requisite hearings and trial on the merits." Defs.' Mem. of Law in Supp. of Mot. for Partial Summ. J. at 27.

<sup>44</sup>The defendants argue that Freeman can make no showing of a procedural due process violation, since Freeman had the appropriate judicial hearings. Freeman does not oppose this argument, nor can we readily find anything in Freeman's factual averments that suggest that such a violation occurred. We will  
(continued...)

Ct. 1865, 1871 (1989). However, "[Graham] does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process," United States v. Lanier, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 1228 n.7 (1997). We also note that in our Circuit, "the substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience'", Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994).<sup>45</sup>

In response to defendants' argument, Freeman contends that we should not enter judgment on the substantive due process claims, as "[t]he propriety of Mr. Freeman's cause of action for the violation of his due process rights is even more obvious at this juncture in light of the proof in the record concerning the truly egregious and barbaric conduct of the Defendants,"

---

<sup>44</sup>(...continued)  
thus focus on the question of substantive due process violations.

<sup>45</sup>But cf. Fuentes v. Wagner, 206 F.3d 335, 348 (3d Cir. 2000) (noting that the application of the "shocks the conscience" standard may be limited to certain classes of claims under substantive due process).

Freeman's Mem. of Law in Opp'n to Mot. for Partial Summ. J. at 44.

We initially note that the question before us does not concern whether the defendants' conduct was "egregious and barbaric", nor even whether it shocked the conscience. Instead, our question is whether Freeman has alleged constitutional violations that fall outside the rights that other constitutional provisions protect. That is, if all of Freeman's allegations can fall under Fourth or First Amendment analysis, then there is no substantive due process claim, no matter how bad the government officials' conduct was. Here, the defendants contend that no such violations have been uncovered during the discovery process.<sup>46</sup> In response, Freeman fails to point to evidence showing such unenumerated constitutional violations, but instead simply avers that discovery has shown really bad conduct.

Count III of the Complaint is directed against Officer Sollman, Sergeant Weston, and Captain Schlegel. A review of the facts Freeman rehearses in his brief opposing summary judgment shows that these defendants' involvement in the alleged harms to Freeman is limited to the harms resulting from the police's alleged use of excessive force. Sollman and his dog are accused of physically assaulting Freeman. Schlegel is accused of improperly effecting Freeman's arrest, and also, arguably, of

---

<sup>46</sup>The defendants thus implicitly contend that their alleged bad acts violated only Freeman's Fourth and First Amendment rights.

having assigned officers to the bridge in contravention of policy in such a way as to cause the use of force. Weston is accused of having ordered the police action that caused Sollman's use of force. These officers are also accused of violating Freeman's First Amendment rights in the course of exerting force on, and affecting the seizure of, Freeman. There is nothing in the claimed fact set to suggest that Sollman, Weston, or Schlegel violated any other rights -- that is, rights amenable to a substantive due process analysis.

We therefore will grant judgment to the defendants as to the due process claims in Count III of Freeman's Complaint.

L. Freeman's Equal Protection Claims

Defendants next argue that they deserve judgment as to the claims in Count III of Freeman's Complaint alleging a violation of his equal protection rights, in that there is no evidence to show that Easton police treat fans of the Phillipsburg football team any differently than they do others. In response, Freeman argues that discovery has shown that everyone attacked by the Easton Police Department on Thanksgiving Day, 1997 were residents of Phillipsburg or its immediate vicinity and were fans of the then-victorious Easton High School football team. Thus, Freeman contends, taking the facts in the light most favorable to the plaintiff, there is support for the claim that Easton police treated Freeman differently because he

was a member of the class consisting of fans of the Phillipsburg football team.

We cannot agree with Freeman's analysis here. For one thing, Freeman has not identified for us, nor have we readily been able to locate, evidence in the record that supports the claim that police treated differently members of other groups engaged in actions similar to those in which the plaintiffs were engaged. That is to say, Freeman has pointed to no evidence that would go to show that other large groups of people proceeding down a public thoroughfare so as to require the closure of the road are not similarly subject to crowd control action by the Easton police. Thus, the claim that the Easton Police's large-scale behaviors reflected different treatment of Phillipsburg fans, as opposed to other groups, is not supported here.<sup>47</sup>

---

<sup>47</sup>More than that, however, we note that Freeman contends that part of the "ritual" involved with the game is that groups of Phillipsburg fans, when passing Easton police officers on the Easton side of the Route 22 bridge during the post-game walk back to Phillipsburg, traditionally yell derogatory remarks about Easton and its football team at those Easton police officers. Thus, we suppose, to make an equal protection claim stick, Freeman might well need to show that the Phillipsburg football fans were treated differently than other large groups of individuals who not only made it a practice to congregate as pedestrians on vehicle roadways, but who also regularly shout invective at the police.

We also note that among the facts elicited in discovery are those tending to show that both Officer Remaley and Captain Schlegel had histories of alleged misconduct, including allegations of excessive force, which occurred independent of Phillipsburg football fans. That is, Freeman is contending both that the attacks on the Phillipsburg fans demonstrated differential treatment, and that various of the police had long histories of abuse to others that should have alerted decisionmakers. While these allegations are not necessarily

(continued...)

Freeman also seems to claim that the individual actions of the Easton officers on the bridge evidenced an equal protection violation by pointing to the fact that all who were injured on Thanksgiving Day 1997 were Phillipsburg fans. However, we cannot see how this is relevant to an equal protection claim. It appears undisputed that the large crowds on the bridge were either exclusively, or nearly so, pedestrians coming from the football game headed towards Phillipsburg. It is therefore clear that the people on the bridge were exclusively, or nearly so, fans of the Phillipsburg team. Thus, the fact that only Phillipsburg fans were injured in the melee doesn't go to show an equal protection violation, since only Phillipsburg fans were present in the crowd in the first place.

We will therefore grant judgment to defendants Sollman, Weston, and Schlegel as to the equal protection claims in Count III of Freeman's Complaint.

---

<sup>47</sup>(...continued)  
internally inconsistent, the discord between them goes to support our conclusion that there is no equal protection claim here.

Finally, we note that the "traditional" nature of some of the crowd actions, which led the police to expect trouble, would tend to justify differential treatment even if Freeman was able to show -- as he has not -- that such differential treatment occurred. Since being a Phillipsburg high school football fan is not a suspect classification, any differentiation would pass constitutional scrutiny if it was rationally related to a legitimate government purpose, see Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458, 108 S. Ct. 2481, 2487 (1988). Given the history of fan behavior, it is likely that Easton would be able to survive such review. But this is only an interesting digression: the evidence makes no showing of differential treatment in the first instance.

M.     Freeman's Claims Under  
          Pennsylvania Constitutional Law

The defendants claim that they should be awarded judgment as to Freeman's allegations under the Pennsylvania Constitution contained in Count IV of his Complaint. As Freeman made such allegations with respect to three distinct constitutional provisions, we shall address each in turn.

1.     Claims under Article I, Section 7  
          of the Pennsylvania Constitution

Defendants contend that Freeman has failed to state a claim under Article I, Section 7 of the Pennsylvania Constitution, which is the Pennsylvania Constitution's freedom of speech provision, because he has made no showing that he was engaged in protected speech.

We found above in our discussion of Freeman's federal First Amendment claims that we cannot now conclude that Freeman was engaged in unprotected speech, and so we will deny defendants' argument as to Article I, Section 7 of the Pennsylvania Constitution.

2.     Claims under Article I, Section 8  
          of the Pennsylvania Constitution

Defendants argue that Freeman's claims under Article I, Section 8 of the Pennsylvania Constitution (the search and seizure provision) must be dismissed because the only search of Freeman occurred during his arrest, after he had disobeyed an officer's order, and because the fact that he went to trial shows

that there was probable cause for his arrest. In response, Freeman argues that this claim is a repetition of that the defendants made in their earlier motion to dismiss, and refers us to his response to that motion to dismiss. In that response, Freeman argued that all arrests must be supported by probable cause and that Freeman had alleged that there was no probable cause for his arrest.<sup>48</sup>

In Pennsylvania, probable cause is "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent [person] in the same situation in believing that the party is guilty of the offense." Tomaskevitch v. Specialty Records Corp., 717 A.2d 30, 33 (Pa. Cmwlth. 1998) (internal quotation marks omitted).<sup>49</sup> In resolving the defendants' motion to dismiss, we noted that since the question of a violation of Article I, Section 8 appeared to turn on a probable cause determination, such a fact-intensive inquiry was not suited to a Rule 12(b)(6) analysis.

---

<sup>48</sup>This description points out the problem with Freeman's tactic of relying on arguments crafted at the Rule 12(b)(6) stage to defend summary judgment: while at the Rule 12(b)(6) stage we look to the allegations, here we must look to the facts elicited in discovery. Freeman makes no specific argument regarding these facts and how they support his claim under Article I, Section 8. On the other hand, Freeman is correct in claiming that the defendants' argument here is a mere duplication of their argument in their Rule 12(b)(6) motion.

<sup>49</sup>The Federal standard is equivalent: "facts and circumstances sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." United States v. Boynes, 149 F.3d 208, 211 (3d Cir. 1998) (internal quotation marks omitted) (quoting Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d. Cir. 1997)).

Though we now have reference to a record, the disputed facts surrounding Freeman's interaction with the defendants prevent us from concluding that the police necessarily had probable cause for arresting Freeman.<sup>50</sup> To the extent that defendants point to the fact that Freeman's case went to trial, we reiterate what we noted in our June 23, 2000 Order: the defendants have not cited any authority to show that the existence of probable cause is definitively established by the fact that the plaintiff was charged with offenses and went to trial.

We therefore deny defendants' motion as to Article I, Section 8 claims.

3. Claims under Article I, Section 13 of the Pennsylvania Constitution

Defendants argue that they warrant judgment as to Freeman's claims under Article I, Section 13 because that section's provision against cruel punishments is co-extensive with Eighth Amendment protections, and we have previously dismissed Freeman's Eighth Amendment claims.<sup>51</sup> In response, Freeman again correctly argues that defendants' arguments are a repetition of arguments unsuccessfully made in the defendants' Rule 12(b)(6) motion, and refers us to his own response to that motion, in which he cited Commonwealth v. Cottam, 616 A.2d 988

---

<sup>50</sup>We arrived at a similar finding with respect to qualified immunity in our discussion above.

<sup>51</sup>In our Order of June 23, 2000.

(Pa. Super. 1992) for the proposition that Article I, Section 13 applies to pretrial confinement.

In our Order of June 23, 2000, we observed that the Cottam case presents us with a conundrum in that Cottam simultaneously states two propositions: (1) Article I, Section 13 is coextensive with the Eighth Amendment; and (2) Article I, Section 13 applies to pretrial confinement. These two propositions are internally contradictory since the Eighth Amendment itself does not generally apply to the conditions of pretrial confinement, see, e.g., Fuentes, 206 F.3d at 347.<sup>52</sup> Thus, as Freeman's relatively brief incarceration was pre-trial, whether Article I, Section 13 applies to him depends on which of Cottam's holdings we follow.

Ultimately, we find it reasonable to follow Cottam's application of the law to the facts, rather than its statement regarding the relationship between Pennsylvania and federal constitutional law, and we therefore find Article I, Section 13 applicable to Freeman's confinement. We therefore reject defendants' arguments with respect to Freeman's claims under this provision.<sup>53</sup>

---

<sup>52</sup>Fuentes did find the Eighth Amendment applicable to injuries suffered during a prison disturbance, but there is nothing to suggest that such a situation obtains here.

<sup>53</sup>At the risk of repetition, we must again express our frustration with the content of the defendants' briefing here. In our earlier Order, we went to some effort to highlight the problem Cottam posed: we devoted a two-paragraph footnote to the issue, at the end of which we concluded that "absent more  
(continued...)

N. Freeman's Claims of False Imprisonment

Defendants argue that judgment should be entered in their favor on Freeman's false imprisonment claim in Count VIII because such a claim can only arise from a false arrest, and a false arrest is one made without probable cause, and here probable cause was present.

"A police officer may be held liable for . . . false imprisonment when a jury concludes that he did not have probable cause to make an arrest," Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). As we have said before, given the factual disputes as to events surrounding Freeman's arrest, we cannot find at the summary judgment stage that probable cause was present. We will therefore deny defendants' motion with respect to the false imprisonment claim.

---

<sup>53</sup>(...continued)  
extensive briefing on this topic by the parties" (emphasis added) we would take Cottam to mean that Article I, Section 13 is applicable to pretrial detention (this is the same conclusion we arrive at above). We therefore rather clearly invited additional argument on this topic in subsequent motion practice. Instead, the defendants here advanced exactly the same argument as before, an argument that they must have known was destined to fail given our provisional finding in the earlier Order combined with the fact that they engaged in no further argument. This prompts us to wonder whether the defendants even bothered to read our earlier Order.

In any event, and possibly more troublesome as the case moves toward trial, the defendants' motion also leaves aside several obvious questions about Freeman's Article I, Section 13 claims, foremost among them whether the mere fact of pretrial detention, rather than the conditions thereof, fall within that section's purview. However, as elsewhere in this Memorandum, we are quite loath to make the defendants' arguments for them, and we shall continue that practice here.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITCHELL RICKER et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
SERGEANT	:	
MICHAEL D. WESTON et al.	:	NO. 99-5879

ORDER

AND NOW, this 22nd day of November, 2000, upon consideration of defendants' motion for partial summary judgment, and the plaintiffs' responses thereto, and for the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

1. The defendants' motion is GRANTED IN PART, in accordance with the following five paragraphs;

2. All of the plaintiffs' claims against the City of Easton Police Department are DISMISSED;

3. Counts I through III of plaintiff Mitchell Ricker's Complaint are DISMISSED as to defendant Officer John Remaley;

4. Judgment is entered in favor of defendants the City of Easton, Chief Lawrence Palmer, and Mayor Thomas Goldsmith as to Count III of plaintiff Alessio Zagra's Complaint;

5. Judgment is entered in favor of defendants the City of Easton, Chief Lawrence Palmer, and Mayor Thomas Goldsmith as to Count III of plaintiff Mitchell Ricker's Complaint;

6. Judgment is entered in favor of defendants Officer Jesse Sollman, Sergeant Michael Weston, and Captain Douglas

Schlegel with respect to Count III of Eric Freeman's Complaint;  
and

7. In all other respects, defendants' motion is  
DENIED.

BY THE COURT:

---

Stewart Dalzell, J.